STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 284830 Saginaw Circuit Court
TIMOTHY DEMETRIS HOLDEN, Defendant-Appellant.	LC No. 03-023823-FH

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the record does not support the majority's conclusion that defendant knowingly, intelligently, and voluntarily waived his Sixth Amendment right to counsel.

I. Proceedings Related to Representation by Counsel

In April 2003, the Saginaw County prosecutor charged defendant in this case with insurance fraud, MCL 500.4511(1), and conspiracy to commit insurance fraud, MCL 500.4511(2) (the insurance case).[1] In a separate circuit court case involving unrelated facts (LC No. 04-024329-FH), defendant was charged with multiple counts of arson, employing false pretenses with the intent to defraud, filing a fraudulent tax return, and committing a fraudulent insurance act (the arson case). Defendant retained counsel in both cases. Defendant's first retained attorney successfully moved to withdraw, as did his second retained counsel.

On February 14, 2006, defendant appeared before the trial court without counsel, and the following colloquy ensued:

> *The Prosecutor*: Judge on the file in which Mr. Holden is charged alone facing the arson and insurance fraud, I've spoken to him briefly this morning. He still is here without counsel. This matter has been set many times for trial. We've

[1] The prosecutor charged a codefendant with malicious destruction of a building, MCL 750.380(2)(a).

never gone over Michigan Court Rule 6.005 about self-representation, and I would ask the Court to please do that this morning.

The Court: Sir, do you understand the dangers of that?

Defendant: No, I do not. But I told [the prosecutor] this morning I was trying to retain Mr. Scorsone. I was gathering the money because I got two—there's two different court cases on that. So it was quite a lot of money I had to come up with. And I told him I was retaining—working to retain Mr. Scorsone. So I was asking for an adjournment . . . .

The Court: Well, let me ask you this: How far did you go in school, sir?

Defendant: Twelfth grade.

The Court: Have you had any experience in litigation, either from, you know, landlord/tenant type situations or any kind of—

Defendant: Right. I had to come to landlord/tenant.

The Court: I'm not quite sure. Are you indicating you want to represent yourself, or are you just at the point where you claim you can't hire an attorney?

Defendant: No, I was telling [the prosecutor] that I wanted an adjournment. I was getting the rest of my money to hire Mr. Scorsone.

The Court: Well in all fairness, sir, . . . I'll give you two choices here. You can either try the case yourself, or I'll appoint someone and you pay them back. Because, you know, we cannot continually—this will go on until ad infinitum here. We're going to come in here and on the day of trial you're not going to be ready to go. So if you want to represent yourself fine. But if you don't, I'm going to appoint somebody, a qualified attorney from the list here, and you will be billed after the case is over, period.

What's your pleasure here?

Defendant: Well, I need an attorney.

The Court: Okay. I understand that. So I'll appoint someone. . . .

* * *

I don't know how else to handle this because I don't—I'm not entirely confident that you could represent yourself. You're not asking to either, so I don't know how else I can proceed. . . .

The trial court then appointed Scorsone as defendant's counsel in both the insurance and arson cases.

In June 2006, defendant stood trial in the arson case and a jury convicted him of all charges. On September 6, 2006, Scorsone advised the trial court that in the insurance case, defendant "no longer wants my services based on issues stemming from the first trial."[2] The trial court appointed Henry Greenwood to represent defendant in the insurance case. Greenwood failed to appear at a November 13, 2006 motion hearing to address a proposed amendment to the prosecutor's witness list, on which the trial court withheld a ruling. The next day, the court adjourned trial for a week at the prosecutor's request. On November 20, 2006, Greenwood and the prosecutor appeared for trial, but because Greenwood had neglected to prepare a writ of habeas corpus, defendant was not present. Greenwood represented to the court that he intended to respond to multiple motions filed by the prosecutor. The trial court granted Greenwood an adjournment.

On January 25, 2007, Greenwood informed the court that he still intended to "file those motions," but had not yet done so. The court again adjourned trial. Six months later, on June 28, 2007, the parties appeared for trial. Greenwood apprised the court that he had not yet filed the defense motions, explaining,

> I indicated to the Court that I have failed to do so because of several things, one of which during the course of my investigation on the appeal that I've run across some other issues which would reframe the issues that I wanted to file.
>
> I apologize to the Court and to Mr. Holden. However, Your Honor, it appears from my discussions with Mr. Holden that he is—he may be unsatisfied with my performance and the delay in these particular proceedings attributable to me.

Defendant expressed his dissatisfaction with Greenwood's prolonged failure to file the motions, in part because he had remained in "high level security" during the delays. The trial court granted defendant's request for substitute counsel, and on July 2, 2007 appointed William Cowdry.

A month after Cowdry's appointment, he filed a motion seeking additional expenses for visiting defendant at the Mound Road Correctional Facility in Detroit. On August 27, 2007, the trial court denied Cowdry's motion and ordered defendant brought to Saginaw for a meeting with Cowdry. Cowdry further advised the court that although the case was scheduled for trial on October 30, 2007, "I don't think I'm going to be ready." The court replied, "[I]f you're not ready, we can adjourn it." The trial court file reflects that defendant met with Cowdry on September 28, 2007. On October 15, 2007, Cowdry moved to withdraw. The transcript of an October 22, 2007 hearing includes the following relevant exchange:

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[2] Defendant's appeal in the arson case, LC No. 04-024329-FH, included a claim of ineffective assistance of counsel, which this Court rejected. *People v Holden*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2008 (Docket No. 272633), slip op at 6-7. The Supreme Court denied leave to appeal. *People v Holden*, 482 Mich 1034 (2008).

Cowdry: This is my motion—to withdraw as counsel. After meeting with Mr. Holden, he asked me to file this motion.

Correct?

Defendant: Correct.

The Court: How many attorneys have we been through?

Cowdry: I . . . think I'm number five if I'm counting correctly.

The Court: What's the—has there been a breakdown in the attorney/client relationship?

Cowdry: Quite frankly, I don't think there ever was an attorney/client relationship.

Defendant: I say, Your Honor, I sent a letter out to you with documents stating my reasons why I'm … relinquishing this attorney and the past five attorneys, and I'm asking to represent myself with appointed counsel to assist me.

The Court: Okay. Well, I'll go for that. I'll grant your motion. We'll get someone to sit there and make sure you—you know how to ask the proper questions. We'll try it that way, I guess. It may be the simplest way.

On October 25, 2007, William White entered an appearance as counsel for defendant.

On November 1, 2007, defendant filed a witness list, and the prosecutor moved to strike many of the defense witnesses. On November 19, 2007, the trial court held a hearing to address the prosecutor's motion to strike, at which defendant did not appear. White urged the court to hold its motion ruling in abeyance, explaining, "I haven't met with him yet. . . . Hope to see him this week." The trial court responded, "All your job is [sic] explain things to him. When we pick the jury, explain to him how . . . it goes, how you—if he asks questions, how you phrase questions, something like that. You don't have anything beyond that." The trial court then granted the prosecutor's motion to strike most of the defense witnesses.

Trial commenced on February 5, 2008, with the following colloquy:

The Court: Sir, I understand you wish to represent yourself.

Defendant: That's correct.

The Court: Couple questions. How far did you go in school, sir?

Defendant: Twelfth grade.

The Court: Do you understand there are some problems with representing yourself? There are some dangers involved in the process here.

Defendant: Yes.

The Court: And you feel competent that you can abide by the court rules and carry on here?

Defendant: Yes, I can, but Your Honor, I feel we cannot proceed today.

Defendant elaborated that he had not received the transcripts of all prior hearings or "certain documents and letters that I sent." Without explanation, the trial court denied further adjournment. That afternoon, the parties selected a jury.

The next day, defendant attempted to make an opening statement. Soon after he started speaking to the jury, defendant announced, "And I'm feeling, Your Honor, that I'm going to be requesting for attorney to handle this because this is being—." The trial court interrupted as follows:

The Court: The record should reflect you've had six attorneys, sir, and you requested to represent yourself. The Court allowed you to represent yourself on your request.

Defendant: I'm feeling incompetent.

The Court: You had six attorneys.

Defendant: Yes, sir.

The Court: Proceed.

Defendant subsequently represented himself through the remainder of trial.

II. Analysis

A. Governing Legal Principles

The Sixth Amendment affords defendants facing possible incarceration the right to assistance of counsel, a constitutional guarantee "indispensable to the fair administration of our adversarial system of criminal justice." *Maine v Moulton*, 474 US 159, 168; 106 S Ct 477; 88 L Ed 2d 481 (1985). The right to represent oneself in a criminal trial is also implicitly embodied in the Sixth Amendment. *Faretta v California*, 422 US 806, 814; 95 S Ct 2525; 45 L Ed 2d 562 (1975). The right of self-representation "seems to cut against the grain" of the Supreme Court's repeated emphasis on the right to counsel. *Id*. at 832. But while these two aspects of the Sixth Amendment may sometimes collide, the right to be represented by counsel is indisputably preeminent. See, e.g., *Brewer v Williams*, 430 US 387, 404; 97 S Ct 1232; 51 L Ed 2d 424 (1977). Stated alternatively, "it is representation by counsel that is the standard, not the exception." *Martinez v Court of Appeal*, 528 US 152, 161; 120 S Ct 684; 145 L Ed 2d 597 (2000); see also *Lakeside v Oregon*, 435 US 333, 341; 98 S Ct 1091; 55 L Ed 2d 319 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.").

Because the right to counsel qualifies as a fundamental right, the United States Supreme Court has instructed courts to "indulge in every reasonable presumption against [its] waiver." *Brewer*, 430 US at 404. The Michigan Supreme Court has repeatedly emphasized that a court must follow specific procedures before permitting a defendant to waive his right to counsel. In *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976), our Supreme Court held that initially, a trial court must establish that a defendant has unequivocally selected self-representation instead of representation by counsel. "Second, once the defendant has unequivocally declared his desire to proceed *pro se* the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily." *Id*. at 368. To demonstrate that a defendant has made his election for self-representation "with eyes open," the court must make the defendant "aware of the dangers and disadvantages" attending this decision. *Id*. Third, the trial court must satisfy itself that a defendant's self-representation "will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id*.

In *People v Adkins (After Remand)*, 452 Mich 702, 706; 551 NW2d 108 (1996), criticized on other grounds in *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004), our Supreme Court held that trial courts "must substantially comply with the waiver of counsel procedures" set forth in *Anderson*, as well as the provisions of MCR 6.005(D). "The purpose of MCR 6.005, like *Anderson*, is to inform the defendant of the risks of self-representation." *Adkins*, 452 Mich at 722. In *Williams*, 470 Mich at 642, the Supreme Court reaffirmed the necessity of substantial compliance with the requirements of MCR 6.005(D)(1), observing that the rule "governs procedures concerning a defendant's waiver of the right to an attorney." The Supreme Court further explained that the court rule "prohibits a court from granting a defendant's waiver request" without supplying the requisite cautions. *Id*.

According to the relevant portions of MCR 6.005(D),

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
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> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

This court rule embodies the notion that explicit elucidation of a defendant's understanding of the risks he faces by representing himself and his willingness to undertake those risks reduces the likelihood that a court will inaccurately presume an effective waiver of the right to counsel.

B. Defendant's Initial Waiver of His Right to Counsel

On October 22, 2007, defendant's fifth attorney requested permission to withdraw, and defendant asked to represent himself "with appointed counsel to assist me." The transcript of this hearing reveals that the trial court thereafter made no attempt to comply with MCR

6.005(D). The trial court at no point advised defendant of the charges and possible penalties he faced, and neglected to engage defendant in a discussion about his competence, the reasons he desired to represent himself, or the risks of self-representation.[3] Instead, the trial court readily acceded to defendant's request, stating only, "Okay. Well, I'll go for that. I'll grant your motion. We'll get someone to sit there and make sure you . . . know how to ask the proper questions. We'll try it that way, I guess. It may be the simplest way." The trial court correctly characterized its method as "the simplest way." However, the court's manner of proceeding plainly did not come close to constituting the correct method. A defendant cannot knowingly and intelligently forego his right to counsel without expressing some recognition of counsel's "core functions and the lawyer's superior ability to perform them." *United States v Kimmel*, 672 F2d 720, 721 (CA 9, 1982). In light of this clearly inadequate colloquy, I would hold that defendant did not effectively waive his right to counsel, and would reverse defendant's convictions.

The majority holds that because defendant attached copies of the felony complaint to his pro se pleadings and had previously discussed a plea bargain in open court, the trial court's failure to advise defendant of the charges he faced and their possible penalties suffices to demonstrate "substantial compliance" with the court rule. But this holding flies in the face of the United States Supreme Court's admonition that courts must indulge every reasonable presumption *against* waiver of the right to counsel, and refrain from assuming acquiescence in the loss of this fundamental right. See *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 2d 1461 (1938). Moreover, the Michigan Supreme Court's mandate that trial courts substantially comply with the requirements of MCR 6.005(D) serves an important and indispensable institutional purpose. A formal colloquy addressing the risks of self-representation forces the defendant to confront the reality of his situation, and to consider carefully the benefits of counsel. An actual give-and-take conversation may reveal that a defendant's expressed desire for self-representation is fraught with ambiguity rather than being unequivocal, borne of momentary frustration or anger, or not truly made "with eyes open." Absent a record specifically documenting a defendant's comprehension of the dangers inherent in undertaking his own defense, an appellate court should not presume an intelligent, knowledgeable and understanding waiver of a fundamental constitutional right. And "even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." *United States v Welty*, 674 F2d 185, 189 (CA 3, 1982).

[3] Although defendant expressed that he wished to "relinquish" Cowdry, the transcript contains no further elaboration about the reason for defendant's request. At the October 22, 2007 hearing, the trial court did not question defendant regarding the basis for his dissatisfaction with Cowdry or the particular facts and circumstances surrounding defendant's request to discharge Cowdry. Certainly, defendant may have intended to "game the system" by interposing complaints concerning yet another attorney solely for the purpose of delay. But there can be little doubt that defendant's previous dissatisfaction with respect to attorney Greenwood qualified as both understandable and reasonable, given Greenwood's inexplicable failure between November 20, 2006 and June 28, 2007 to file pretrial motions that Greenwood viewed as legally meritorious.

This record contains no finding by the trial court that defendant competently, knowingly, intelligently, and voluntarily waived his right to counsel. At the hearing held on February 14, 2006, the trial court had expressed, "I'm not entirely confident that you could represent yourself." At that point, defendant was not incarcerated, and presumably had far greater access to the tools necessary for adequate self-representation. I cannot discern in the record a rational basis that defendant gained competence during the approximately 15 months that he remained incarcerated while awaiting trial in this case.

C. Trial

Because the trial court neglected to obtain an effective waiver of counsel at the October 2007 hearing, it was incumbent on the court to ascertain on the first day of trial that defendant knowingly, intelligently and voluntarily elected self-representation and waived his right to counsel. When trial commenced, the court engaged defendant in a brief discussion about self-representation. The trial court inquired how far defendant had gone in school, and whether defendant understood that "there are some problems with representing yourself? There are some dangers involved in the process here." Defendant advised the court that he felt competent he could "abide by the court rules and carry on here," but stated that he could not proceed because he lacked some material relevant to his defense. In my view, this colloquy failed to substantially comply with MCR 6.005(D) and MCR 6.005(E), which provides in pertinent part,

> If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, *trial*, or sentencing) need only show that *the court advised the defendant of the continuing right to a lawyer's assistance* (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one. [Emphasis added.]

"Warnings of the pitfalls of proceeding to trial without counsel . . . must be rigorous(ly) conveyed.'" *Iowa v Tovar*, 541 US 77, 89; 124 S Ct 1379; 158 L Ed2d 209 (2004) (internal quotation omitted); see also *People v Russell*, 471 Mich 182, 193 n 27; 684 NW2d 745 (2004) ("It is worth noting … that an effective waiver of *trial* counsel requires a more exacting waiver than that required to waive counsel at pretrial stages of the proceedings.") (emphasis in original). Rather than demonstrating the "methodical" waiver exchange contemplated in *Adkins*, the instant record reflects that the trial court engaged in an entirely perfunctory, three-question exchange that revealed precious little about whether defendant knowledgeably and intelligently relinquished his right to counsel. In *Adkins*, 452 Mich at 723, our Supreme Court emphasized that "the effectiveness of an attempted waiver does not depend on what the court says, but rather,

what the defendant understands." Here, the record shows virtually no indication of what defendant understood with respect to the risks of waiving his right to counsel. Indisputably, the first day of a delayed trial presents a less than ideal moment for a waiver exchange mandated by MCR 6.005(D). But in my view, this was a problem of the trial court's own making. Had the trial court obtained an effective waiver on October 22, 2006, it would have needed only to reaffirm defendant's willingness to forego counsel and advise defendant of his ongoing right to a lawyer's assistance.

Moreover, the court rule's requirement that a court must advise the defendant at trial of "the continuing right to a lawyer's assistance" serves as a potent reminder of the preeminence of the right to counsel at a critical stage of the proceedings. By including in the court rule that *on the day of trial* a court must offer appointed counsel to a defendant who has previously elected self-representation, our Supreme Court undoubtedly recognized the potential for disruptions and delays, including that a defendant might change his mind on the courthouse steps. Had this trial court accomplished a perfectly effective waiver, it nevertheless would have had to tell defendant that he still enjoyed a right to appointed counsel.[4] Possibly, had an inquiry been made that morning that included a discussion of the dangers of self-representation and the advantages of counsel, defendant may have elected to representation by standby counsel through trial. But because the trial court failed to comply with this obligation, it is impossible to know which course defendant would have chosen. And as a result, defendant entirely lacked counsel during a critical stage of the proceedings, requiring reversal of his conviction. *People v Willing*, 267 Mich App 208, 228; 704 NW2d 472 (2005).

In summary, this record fails to demonstrate that the trial court substantially complied with the requirements precedent to an effective waiver of the right to counsel. The record also does not substantiate that defendant understood the risks and complexities associated with self-representation. As a result, defendant stood trial without counsel. On the basis of these errors of constitutional dimension, I would reverse defendant's convictions and remand for a new trial.

/s/ Elizabeth L. Gleicher

[4] Given that, even if properly obtained, defendant's previous waiver of the right to counsel did not extinguish the right to counsel, I question why the trial court apparently failed to consider asking standby counsel to assume the defense when defendant claimed incompetence at the outset of trial. In response to defendant's expression that he was "feeling incompetent," the trial court neglected to explore the ability or readiness of standby counsel to proceed in defendant's place. Instead, the trial court remarked, "You had six attorneys. … Proceed." In my view, this abbreviated, punitive response does not constitute an appropriate exercise of discretion. Rather, it reflects an abdication of the court's responsibility to carefully and thoughtfully safeguard the integrity of the trial process. Forcing defendant to stumble inadequately prepared through a trial "serves neither the individual nor our system of adversarial justice well." *Menefield v Borg*, 881 F2d 696, 700 (CA 9, 1989).